(1)

91-654

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

PAUL J. CAFARO
- PETITIONER

vs.

PEOPLE OF THE STATE OF NEW YORK
- RESPONDENT

PETITION FOR WRIT OF CERTIORARI TO THE NEW YORK APPELLATE TERM OF THE SUPREME COURT FOR 9TH & 10TH JUDICIAL DISTRICTS

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QUESTION PRESENTED

As a matter of tradition, the collective conscience of our people, and respect for paramount Constitutional law, and its inherent moral principles, as formally established by this Court in Marbury v. Madison, is it not this Courts obligation to find State Court rulings in conflict with the decisions of this Court, and operating as superior law, (1) beyond the specific and implied prohibitions of the First, Fifth, Eighth, Ninth and Fourteenth Amendments to the United States Constitution, and (2) violating this Appellant's vested personal right to the equal protection of, legislated law, and self-evident Natural law; expressly repugnant to the Constitution, improper, without authority and void?

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NO. _____

IN THE SUPREME COURT
OF THE
UNITED STATES OF AMERICA

October Term, 1991

Paul J. Cafaro, Petitioner, Pro Se
vs.
People of the State of New York, Respondent

PETITION FOR WRIT OF CERTIORARI TO THE
NEW YORK APPELLATE TERM OF THE SUPREME COURT
FOR THE 9TH & 10TH JUDICIAL DISTRICTS

INTRODUCTION

Petitioner,(Appellant), PAUL J. CAFARO, a nuclear physicist by profession, 25 years with the United States Defense Department, at a Research and Development Center noted for its excellence, defending the fundamental freedoms inherent in our society, respectfully prays this Court will overrule the New York State Courts that have

fraudulently tried to make this citizen a criminal, by (1) reaffirming the fundamental principles as logically established in Marbury v. Madison, 1 Cranch 137, 2 L.Ed 60 (1803), (2) giving effect to this Appellant's fundamental personal rights, (3) giving effect to a State's right to legislate constitutional law for the safety and welfare of its people, (4) giving effect to self-evident Natural law we all live by, and (5) find the 4th District Court act, of deeming a trellis arbor, a fence, unconstitutional, without authority and void because it is violative of this Appellant's vested Constitutional rights under the First, Fifth, Eighth, Ninth and Fourteenth Amendments to the Constitution of the United States.

This Appellant seeks from this Court the

justice promised by the Framers of our Constitution, which demands not only reversal of the judgment of conviction and the sentence imposed by the 4th District Court, Nassau County, New York, but this Courts direction, that acts deemed from the bench not have authority superior to self-evident Natural law, Constitutional law and principles, or vested State and personal rights.

This Appellant, my mother and two sisters, all college educated and equal owners of our home, residing in this community for 37 years, respected for our work, originators and founders of an educational mind health and humanities program to further human understanding in our society, have been denied our vested right to decorate our private garden with trellis

arbors, on the patio about our inground swimming pool, and we know the difference between a trellis arbor and a fence.

The basis for determining fenced real property in New York State's general law of State-wide application is:

> "a person is guilty of criminal trespass in the third degree when he knowingly enters or remains unlawfully in a building or upon real property which is **fenced** or otherwise **enclosed in a manner designed to exclude intruders**.", New York State Penal Law Title I Section 140.10(a), Appendix I(3), emphasis added.

This is also the basis for determining fenced property in Town of Oyster Bay Code, when **a fence** is required for a property with an inground swimming pool;

> "Such fencing shall be erected and maintained so as to **completely enclose** at least the outside perimeter of the pool, or the perimeter yard in which the pool is situated.", Town of Oyster Bay Code Sec. 246-39 E(1), Appendix I(8), emphasis added.
> "All (fence) gates or doors must be

equipped with a self closing, self latching device located on the inside of the gate or door. Such gate or door must be **securely closed and locked at all times** when not in use.", Town of Oyster Bay Code Sec. 246-39 E(3), Appendix I(8), emphasis added.

The Town of Oyster Bay Fence ordinance Sec. 327, (and Sec. 246-144 Fences), defines a fence as **a barrier** not exceeding four(4) feet in height, erected

"**With respect to all lot lines** ...", Appendix I(6-7), emphasis added.

So by the explicitly defined fence laws of the Town of Oyster Bay, and General State Law all homeowners have an unrestricted right to a fence, having the **function** of shuting in the land, and the **purpose** of preventing trespass. Although homeowners have the right to partially fence their property or have a few bushes or shade trees or trellis arbors, if they want to keep it open, this should

only be encouraged when a fence is not needed or no obvious danger exists on a property. Certainly homeowners cannot be allowed to claim they have a fence when the land is open, so too, the Respondent and State Courts can't make such a claim. The **legal meaning, function** and **purpose** of a fence is that it be a barrier that **completely encloses** and "**shuts in the land**" to "**prevent intrusion (trespass) from without or straying from within**", and this provides the enforcement powers of the fence ordinance to enclose swimming pools, hazardous waste sites, electrical power transformers, etc. For a Court to enforce these powers in an opposite and perverse way so as to claim that this Appellant's "pieces of trellis work" that do not shut in the land, is a fence, defeats the purpose for which the Legislature defined a

fence; to provide for the safety and "welfare of the community", when a fence is required Appendix J(5),K(9) & Town Law, Sec 261 @ I(4)

Traditional notions of due process require that the fence zoning ordinance Sec. 327, bear at least a reasonable relationship to a legitimate governmental purpose, as in protecting the safety of the general public from unauthorized entry upon private property, either by intruders that ignore fenced property, or by preventing entry upon land that may be considered hazardous, and the 4th District Court ruling in the instant case implicitly nullifies the Police Power protection established for a fence, by elected State Legislators, Town Law, Art. 16, Sec. 261 @ Appendix I(4).

The fence ordinance provides the law upon which the 4th District Court must base its

jurisdiction, and the law must be reasonably and rationally interpreted, and not be in conflict with State legislated general law, that clearly defines the purpose and function of a fence as enclosing, or shutting in the land to prevent trespass. If a Court uses its discretion in a contrived and arbitrary way, inconsistent with Constitutional law, inconsistent with Natural law, inconsistent with general State and Local law, and inconsistent with the Greater Best Interests of Public Safety and Welfare, solely to deprive this Appellant of his trellis arbors (that do not shut in the land), or to selectively burden the incidental accessory use of private property, is repugnant. A permit is required for a fence, to make sure a fence provides its sufficient purpose and substantial function requirements so as to

promote safety and the general welfare.

If New York State Court's can arbitrarily deem a tree, or a patio umbrella, or a trellis arbor that do not shut in the land, and don't require permits, to be a fence, under a perverse Police Power hypothesis, (that creates a clear and present danger to the safety and vested rights of all citizens) in the name of providing safety, light or air for an adjoining land owner is unfounded. A six foot stockade fence legally shuts out adjoining land owners and the Public from any contact with this Appellant's trellis arbors, safely behind the stockade fence, and under Town Code Sec. 326. Accessory Buildings are legally allowed to be located in the same area of the yard this Appellant's trellis arbors are located, and can rise 18 feet into the air, almost twice the height of this

Appellant's trellis arbors in the same location, Appendix I(9). It is unwarranted governmental interference for Court's to effectively supervise the design of trellis arbors, or effectively allocate by personal zoning from the bench, requirements for air, light or shadow on private property, more strictly than the general zoning laws of the Town of Oyster Bay require. Fundamental State and personal rights are, and must continue to be protected by the Federal Constitution. The 4th District Court, and the Respondent, have not shown a subordinating interest that is more compelling.

The direct Prima Facie (photographic) evidence, entered at trial, clearly shows there are many feet of open space between each and every trellis arbor, and that the purpose of this Appellant's trellis arbors is

to support living vines, and also shows they do not shut in the land, Appendix K(10-13).

The Trial Judge referred to this Appellant's trellis arbors as "pieces of trellis work", Appendix K(9); ruling "pieces of trellis work" indistinguishable from a fence gives no effect to self-evident Natural law, certainly, the gravitational, electromagnetic and nuclear forces that bind all objects in this universe together do not do so to the extinction of the identity of individual objects. The self-evident Natural law in this universe does not deny solid objects their own identity or definition even if one object may happen to be affixed to another object. In the stories and legends of men, it is considered magical for self-evident Natural law to be violated, as this implies unlimited power. One such story

depicts a Knight that had to remove a sword affixed in stone to become ruler of the land. Certainly this Court recognizes the distinct objects in this story, a Knight, a sword, and a stone, because each has its own definition, function and purpose, and it would be un-Natural, magical, unlimited power, if the Knight, sword and stone were magically deemed "for lack of a better word", to be a 'fence' by the story teller. It should be clear that when the function and the purpose of trellises and fences are commonly known, or legally defined, it is beyond discretion, it is beyond opinion, it is just plain unlimited power for a Court to selectively tell this college educated Appellant that his trellis arbors are a fence, Appendix K(7).

A fence and a trellis arbor have different functions and different purposes

and a trellis arbor behind a fence is just like a telephone pole behind a fence, both retain their purpose and function even if the legal fence is nailed to it. Self- evident, universal, Natural observation can't be given unequal effect under law, Const. Amend 14.

It is beyond the rule of law to assign the fence word (with a clearly defined legal meaning), to "pieces of trellis work" (which are clearly something other than a fence by its own function and purpose), just as it would be un-Natural to use the word orange to describe an apple, Const. Amend. 14.

A ruling of a State Court in conflict with self-evident Natural law, defined by the Creator, is violative of the vested Constitutional legal right to <u>the equal protection of law</u>. Natural law cannot be overturned or given perverse effect at the

discretion of State Court's, it's as much a rule of law as any defined by man, Amend. 9.

The 4th District Court has no legitimate legal or public purpose in selectively denying Federal, State and Local laws which draws into question their constitutionality, and the Solicitor General, Attorney General of the United States, and the Attorney General of New York State have been advised under, U.S.C., Title 28, Sec. 2403(a),(b).

There must be a legal basis for a Court to declare trellis arbors illegal, and if that legal basis is to deem them a fence, then certainly its only reasonable that a fence as clearly and legally defined by legislated law must be the rule of law that guides a court in the exercise of its jurisdiction.

By the explicitly defined general and

local law of the State of New York that defines a fence, individual sections of stockade fencing, even commonly perceived to have a fence purpose, do not become a fence until they are joined together to enclose or shut in the land, preventing trespass, so too, individual sections of trellis arbor, trees or hedges don't have a fence purpose, if they are not joined together, to prevent trespass, and don't shut in the land. The trial judge knew and described this Appellant's trellis arbors as "pieces of trellis work", but in spite of his perception, he deemed or willed a fence purpose to these separate and distinct trellis arbors, Appendix I(3,7,8), J(5).

When a Judge mistakenly ascribes a fence purpose to trellis arbors, the New York Courts of Appeal cannot find, on the law as

duly enacted in this State, that a trial Judge's opinion is superior to the legislated law.

If a judge ascribes a no trespass purpose to this Appellant's trellis arbors, it is obviously inconsistent and in conflict with the general law of this State, **because trellis arbors that do not shut in the land cannot function with a no trespass purpose**.

Obviously the Courts of Appeal are wrong when they say there is no question of law which ought to be reviewed in this case.

Perhaps the 4th District Court wants to encourage property to be open. Perhaps the 4th District Court wants to change the fence law. Perhaps it wants to encourage all property even hazardous properties to be open. Perhaps it wants to sit in judgment of what constitutes beauty. Perhaps it wants to

design its own trellis arbors on other peoples property. But, whatever the 4th District Courts reason, the duly elected Legislative Representatives of this State have seen fit to define a fence for the Safety and Welfare of the General Public as a barrier that Shuts in the Land, and

> "the subject is within the Police Power of the State", Sproles v. Binford, supra, at 286 U.S. 388.

The State Legislature has never seen fit to require any particular design for trellis arbors, nor seen fit to define beauty by law, because beauty, be it order or chaos, is a personal judgement. In the eyes of this beholder the diversity of beauty and purpose accomplished by constraining randomly growing rose, ivy and grape vines upon separate trellis arbors, is just as beautiful as the chaotic pounding and splashing of the waves,

on the rocks upon a shore, and just as beautiful as the setting sun behind a calm orderly sea. Diversity of belief and ideas as to what constitutes beauty, is not illegal in this country, and can have as many interpretations as the diverse people that contemplate it, duly elected Legislators never enacted a law defining beauty, and Court's cannot legislate beauty from the bench, without Legislated law to guide the exercise of their jurisdiction. Niether trellis arbor requirements, or beauty, has ever been Legislated in the Fence Ordinance Sec. 327, Const. Amend. 1; Appendix I(7).

To deny to this Appellant, within a community containing a wide variety of religious, economic, racial and ethnic backgrounds, the American Dream of a Home in the country with a garden, some flowers, a

few shade trees and some rose or ivy or grape arbors, should not be a ruling made at the discretion of a Court, without some legislated rule of law to guide its jurisdiction. Our Constitution, as the legislated rule of law of this land, has always sought to protect Americans in their beliefs and in their pursuit of happiness, and provided for us the fundamental right to make our private dreams a reality, in a world that withholds from government the power to invade the sphere of private liberties endowed to each of us by the Creator, Const. Amends 1, 5, 9, 14; U.N Declar. Human Rights.

Court's that deem plants, that don't shut in the land, a fence, are in conflict with the Community's Comprehensive Plan, that makes allowance for, and accommodates, the incidental accessory use of plants in a

residential garden. Certainly providing plants access to sunlight, utilizing trellis arbors, is legal, just as using other equipment to accommodate solar energy systems is legal, and plant life promotes the public health and welfare; absorbing air pollution, providing oxygen and fragrance, providing a habitat for birds, a buffer to noise, privacy from disturbance, ecological balance, etc. For a State Court to deny rose and ivy vines growing upon trellis arbors as being a, part of a mans home puts the Court in conflict with the Community Comprehensive Plan, Town Law, Art. 16, Sec. 263), Appendix I(5).

The Legislators are the guardians of the peoples interests by making the laws. The Courts are the guardians of the peoples rights, as defined by the legislated law, and the Constitution. Duly constituted, elected,

Legislative bodies in this State have clearly and explicitly defined the purpose and function of a fence in general State law of State-wide application. The selective application of a State Court's discretion, in conflict with general State law, does not "constitute a rule operative as if it was law" nor can it supersede that law. Marbury v. Madison, supra, at 177.

Laws cannot be given effect just for some of the people some of the time, but must be given effect for all of the people all of the time. Court ruling's, that attempt to govern men and things in such a way as to deny the personal need to establish a home, as a private place, to meditate, or pursue happiness, or find sanctuary in nature, from other associations and pressures of modern day life, or simply for this Rosarian to show

a reverence for Nature and the creations of an intelligence higher than our own, are clearly unconstitutional, Const. Amend. 1.

The Framers of our Constitution sought to protect natural rights to property, to privacy, our beliefs, thoughts and contemplations. It is the "totality of the constitutional scheme" of the Framers, that protects our spiritual nature, our feelings of pleasure, and satisfaction with life, in all its diversity, Poe v. Ullman, 367 U.S. 497, 521, 81 S.Ct. 1752, 1765 (1961).

If there is no law on trellis arbors, the liberty to have them should not be denied. The purpose and function of a fence as explicitly defined by general State law, may in the opinion of the 4th District Court, be too restrictive, be unjust, or be unwise, but a clearly defined fence, that a duly

constituted Legislature defines must enclose or shut in the land, to exclude any trespass, clearly cannot be considered dangerous, or destructive to the public interest, or made dangerous for the Public by the New York Court's effectively deeming things that don't shut in the land, like open "pieces of trellis work", or patio umbrellas, or hedges, etc., a fence, removes the safeguards imposed by duly elected State Legislators to

> "promote the health, safety, (and).. welfare of the community", Town Law, Art. 16, Sec. 261, Appendix I(4).

New York State Court's cannot will themselves the absolute power to deny property use, and liberty, beyond due process, and the equal protection of law, or deny other fundamental personal rights explicitly and implicitly guaranteed in our Bill of Rights to the Constitution which is

"...violative of (this Appellant's) vested legal right(s)" to Constitutional guarantees. The New York Court's must be "amenable to the laws" of this Nation, Marbury v. Madison, supra, at 162, 164; U.S. Const. Amend. 14.

Chief Justice Marshall stated in Marbury

> "if laws furnish no remedy for the violation of a vested legal right... (how can we be) ... termed a government of laws, and not of men.", Id, at 163.

The power to deny the Constitutional laws of elected representatives, or fundamental personal rights, confers absolute power, and as such, is a secession from the moral principles of this Nation and its Constitution.

There is no provision in the Constitution that either expressly, or impliedly, vests power in this Court to set aside Natural law, or to sit as a supervisory agency over the

acts of duly constituted Legislative bodies of a State, or the Congress, and set aside their laws, as explicitly and legally defined, as this would be;

> "wholly beyond the protection ... the Fourteenth Amendment was intended to secure." Sproles v. Binford, 286 U.S. 374, 388, 52 S.Ct. 581, 585, 76 L.Ed. 1167 (1932).

So too, State Courts do not have the authority to sit as a supervisory agency over acts of duly constituted, elected Legislative bodies or their laws, as explicitly and legally defined; especially when a fence is explicitly defined the way it is, by the general law of New York State, in the Interest of the Safety and Welfare of the Public, and the 4th District Court should not tamper with that explicit State definition

> "when the subject lies within the Police Power of the State" Id, at 388-389, 52 S.Ct. at 585.

The Ninth Amendment to the Constitution of the United States, in conjunction with First, Fifth, and Fourteenth Amendment principles, protects this Appellant's vested personal rights, and also protects a State's right to constitutionally legislate the function and purpose of a fence by its law (Const. Amends 1,5,9,14).

The perverse application of the 4th District Court's jurisdiction, deeming open "pieces of trellis work" a fence, violates; (1) this Appellant's fundamental right to ancillary use of trellis arbors, that do not shut in the land, and have the purpose and function of providing support to living vines, on private property not open to the public, behind a legal stockade fence on the border of this Appellant's property, (2) the vested right to erect trellis arbors as a

quiet expression of this Rosarian's right to associate with Nature, and peacefully enjoy ones established home, (3) the fundamental right to be protected by duly constituted State law, as it Legislatively defines the function and purpose of a fence, (4) the fundamental right to be protected equally under self-evident Natural law, (5) the fundamental right to express in ones own way a reverence for all life forms the Creator provided this world, plant or animal, (6) the fundamental right not to be convicted under color of law, (7) the fundamental right not to be cruelly denied property and unusually punished and fined, in excess of the limitations of law, and (8) the vested right to be able to live secure in ones ability pursue happiness, or one's own life-style, thoughts, ideas, etc., without undue

interference by any Court, State or Union of States, essentially, the right to be ruled by the law as defined, or be let alone, US Const Amends. 1,5,8,9,14; U.N. Universal Declar. of Human Rights Art's 2,,3,5,7,8,12,17(2),18,19, 20(2),27(2),28,29(3),30. The Framers knew fundamental rights, expressly enumerated in the Constitution,should not deny or disparage other fundamental rights, not specifically enumerated. If this Court follows the path of the Framers it will not defer to State Courts the unlimited power to rule men by opinion that is in conflict with Constitutional, General, Local and self-evident Natural law, overthrowing the Peoples Interests protected by the Defined Law, Const. Amends 1,5,8,9,14. The above, briefly outlines the legal and moral basis, upon which I ask this Court to issue a Writ of Certiorari, and to review the

Rulings of the New York State Courts below:

The New York Court of Appeals denial on June 10, 1991 of leave to appeal from an order of the Appellate Term of Supreme Court For the 9th and 10th Judicial Districts, dated March 18, 1991 which modified and as so modified affirmed a judgment of conviction of District Court, rendered April 28, 1989 in Fourth District Nassau County New York.

OPINIONS BELOW

The opinion of the New York State Court of Appeals, denying leave to appeal, appears in Appendix A to this Petition. The written opinion of the Appellate Term of the Supreme Court of the State of New York for the 9th and 10th Judicial Districts, appears in Appendix B to this Petition. The written opinion of the 4th District Court Nassau County New York appears in Appendix C.

JURISDICTION

All State appeals were exhausted when New York States highest Court denied leave to appeal on June 10, 1991. This Court's jurisdiction, to review by Petition the important Constitutional questions raised by this Appellant in every Court that considered the instant case, is invoked under Title 28, U.S.C. Section 1254(1), and this Courts jurisdiction to review and determine State Court rulings is invoked under Title 28, U.S.C. Sections 2104 and 2106. This Appellant's fundamental and vested Constitutional rights as enacted by the Framers have been drawn into question because the New York State Courts have given them no effect in the instant case, hence Title 28, U.S.C. Section 2403(a) is also applicable.

This Appellant's fundamental right to be

protected in accordance with the duly constituted New York State laws of General Character and State-wide application have also been given no effect by New York State Courts, drawing into question the constitutionality of these General laws, and the Town Laws and Local Ordinances that explicitly define the purpose and function of a fence, hence Title 28, U.S.C. Section 2403(b) may be applicable, if the Attorney General of New York State is unaware of the proceedings in the instant case.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment 1 to the United States Constitution is set forth in Appendix D.

Amendment 5 to the United States Constitution is set forth in Appendix E.

Amendment 8 to the United States Constitution is set forth in Appendix F.

Amendment 9 to the United States Constitution is set forth in Appendix G.

Amendment 14 to the United State Constitution is set forth in Appendix H.

OPINION OF THIS COURT

This Courts opinion in, conflict with the instant case ruling, is cited from the pertinent cases in the Table of Authorities on page iv.

NEW YORK STATE STATUTORY PROVISIONS INVOLVED

New York State Penal Law, Town Law and Oyster Bay Code, explicitly and implicitly in conflict with the ruling in the instant case is set forth in Appendix I.

FEDERAL QUESTIONS RAISED BELOW

Federal questions raised in 4th District Court, Nassau County, the Appellate Term of the Supreme Court for the 9th and 10th Judicial Districts, and the New York State

Court of Appeals is set forth in Appendix J.

RELEVANT PASSAGES FROM TRIAL TRANSCRIPT AND PHOTOGRAPHIC EVIDENCE

Relevant passages of the Trial Transcript cited in this Petition are found in Appendix K(1-9), and photographs in Appendix K(10-13).

STATEMENT OF THE CASE

On June 6, 1983 this Appellant was served notice by mail that an accusatory instrument would be entered on or about June 21, 1983, at 4th District Court Nassau County, alleging that this Appellant's nine(9) foot tall patio umbrellas, and eight(8) to ten(10) foot tall trellis arbors, on the patio about my inground swimming pool, and behind my legal six(6) foot stockade fence, were a violation of the height limitation of the Town of Oyster Bay Fence Ordinance Sec. 327 (4th District Case # CR 751/83).

On June 11, 1983 an attorney was retained by this Appellant to make clear to the Court, **before trial**, that the People's accusation was a violation of Constitutional rights and so vague as to be ludicrous, because it essentially implies, that anything not shutting in the land can be a fence, clearly contrary to general State law, Town law, Local law, and the self-evident fact that not all objects in this world are a fence.

On December 2, 1983 the 4th District Court Nassau County dismissed the accusatory instrument, without comment.

On October 9, 1987 a second identical accusatory instrument, **the instant case** (CR 2920/87), was brought before the 4th District Court by the Respondent, claiming that trellises, "... ranging in height from

(6') to eight (8) or nine (9)... (or) approximately ten feet (10') high,... (is) improper construction ..." for a fence, and violates the Fence Ordinance Sec. 327, Appendix C(5).

On November 2, 1988 the instant case was brought to trial by the Respondent who declared at trial that

> "for lack of a better word I'll call this (trellis) a fence", Trial Transcript, pg 42, ln 9-10; Appendix K(7).

and established at trial, that (1) a legal fence exists on the border of this Appellant's property, Trial Transcript, pg 7, lns 3-10, Appendix K(1), and (2) established that this Appellant's trellis arbors, behind the legal stockade fence, are interwoven, delicate, and secured to nothing, Appendix K(3), (it was obvious from the information that trellis arbors used to hold and shape living vines couldn't be a fence, by its very construction, let alone its function,

purpose, furthermore, it's self-evident that objects, other than a fence, like a telephone pole, tree, patio umbrella or trellis arbor etc., behind a legal fence, with a different function and purpose than a fence, can't make a legal fence on the border of this Appellant's property "illegal" under Town Law, Art. 16, Sec. 268(1), Appendix I(6)). Yet the Respondent, and Court effectively ascribed such 'Midas touch' qualities to fences, in conflict with Natural law, and in violation of this Appellant's vested personal rights, and a States right to enact its own law.

This Appellant's attorney argued at trial that this same issue was previously resolved by the Court in 1983, as a matter of public record, Trial Transcript, pg 28, ln 19-25; Appendix K(3-4), J(2).

The Respondent interrupted and stipulated that he could not proceed with the 1983 trial as he had no jurisdiction - (the Respondent implied to the Court that it was the legal stockade fence about this Appellant's property that ostensibly provided sanctuary from prosecution although no jurisdiction by law exists with regard to trellis arbors under the fence ordinance sec. 327, Trial Transcript, pg 29, ln 3-14; Appendix K(4), J(1). The Respondent served other accusatory instruments inspite of this Appellant's fence, stipulating only for the 1983 case, the illusory pretense that sanctuary from prosecution exists because a fence shuts in the land, and this Appellant to this day continues to wonder how New York State Courts can justify a legal fence around a property as being superior to Fifth and

Fourteenth Amendment principles, when the same charge was acquitted by the 1983 dismissal, as a matter of public record.

On January 26, 1989 the 4th District Court ruled;

> "... what the People describe as a fence on the defendant's property violates the ordinance and must be removed. If the defendant wishes to maintain a fence on the border of his property, it must be of the proper material and height." (Appendix C).

- but obviously - if homeowners can't claim to have a fence, if their land is open, certainly the People and the New York Court's can't claim this Appellant's trellis arbors are a fence, when they do not enclose or shut in my land. This Appellant argued on appeal that (1) this ruling effectively defers to the People the right to describe anything behind a fence, to be a fence, irrespective of its function or purpose, Appendix J(3-4),

and (2) that I have a permit and variance for the fence on the border of my property, and it is legal, (3) that the 4th District Court and the People's vague definition of a fence is in conflict with State and National definition, function and purpose, and removes the safety and welfare conditions imposed by the explicit, legislated, fence definition, Appendix J(5-9), and (4) the Chief Building Inspector's absurd claim, that this Appellant's trellis arbors, that have never caused any safety problem over the last decade we have owned them, were allegedly dangerously close to power lines, was self-evidently not true, utilities never place power lines so close to the ground that they may touch a patio umbrella or trellis arbor 8 to 10 feet tall, Appendix K(12).

On April 28, 1989, this Appellant was

sentenced to remove the fence on the border of my property by June 30, 1989, or a fine of $2100 dollars would be imposed on July 1,1989 with an additional $10 dollar fine for each day thereafter that the fence remained up. This Appellant argued on appeal that, (1) not only is the judgement in violation of 1st, 5th, 9th and 14th Amendment rights, Appendix J(9), but (2) the sentence violates the Eighth Amendment of the Constitution because it's a cruel and unusual punishment, Appendix J(7), (a) for a Homeowner already acquitted, as a matter of public record,of the one act of erecting trellis arbors and patio umbrellas in 1983 to be fined years later (on September 16th, 1987 and the 8th, 9th, and 22nd of october 1987) for fixing or repairing these trellises, on different dates, before the trial in the instant case

(November 2, 1988) even found them to be a fence, and (b) then be fined in excess of the defined law where $250 dollars is the maximum fine allowed under N.Y. State Penal Law, Title E, Sec. 80.05(4), of New York State Penal Law. The, felony class, $2100 dollar fine imposed, on a first offense, is not only unusual for a violation, but when imposed for the single act dismissed as a matter of public record in 1983 it also violates N.Y. State Penal Law, Title E Sec. 80.15 and Town Law, Art. 16,Sec. 268(1), Appendix I(2),I(6), and, (3) the ruling is inconsistent with the Prima Facie facts, as clearly established by this Appellant's attorney, and the People at trial; because the People's eye witness, the Chief Building Inspector, testified under oath at trial;

"...(the trellis arbors are) just standing up...(not affixed to the stockade fence) ...secured to nothing." Trial Transcript, pg 15,lns 22-24), Appendix K(2), K(3);

testified: "...there's other trellises there...", that are, "Different" .... "the whole thing is a little different concept there.", TrialTranscript, pg. 20, lns. 15-18), Appendix K(3);

when asked: "Does the Defendant have a six-foot fence around his entire premises?"

testified: "Yes, he does.";

when asked: "and did he get permission by virtue of a variance in order to put that fence there?";
testified: "Yes, he did.";

when asked: "so that fence is legally there, six foot?";

testified: "six-foot stockade fence is legally there." (Appendix L, Trial Transcript, pg. 7, lns. 3-11);

when asked: "in the Town of Oyster Bay Code, are there any restrictions as far as trellises are concerned?";

testified: "not to my knowledge" Appendix L, Trial Transcript, pg 30, lns 24-25 and pg 31, lns 1-2),

Can Town of Oyster Bay attorney's be so incompetent, they don't know the definition, function and purpose of a fence, as easily found by myself, and universally defined in every law library of this Nation, and as verified in general New York State statutes?

Under the Rules of Ethics adopted by New York States Highest Court the ongoing illegal actions against this Appellant, since 1983, should not have been continued. For attorneys to perpetrate what they have, upon the judiciary tribunals responsible for deciding this matter is illegal by the Rules of Ethics (attorney's cannot place themselves in a position to shield illegal actions or foster a malicious prosecution, Appendix J(1), J(5).

On July 27, 1989 this Appellant filed his appellate brief detailing his objections to the 4th District Court ruling, on the facts,

and on State and Constitutional laws.

On January 11, 1990 this Appellant submitted a motion before the 4th District Court for permission to reconstruct the entire trial record that mysteriously disappeared at the Appellate Term Court.

On March 18, 1991 the Appellate Term Court for the 9th and 10th Judicial Districts, in its opinion, effectively deferred to the opinion of the 4th District Court, sanctioning the ruling that deemed "pieces of trellis work" a fence, and that a previous 1983 dismissal of the same charge against the same Homeowner was not dispositive of the instant action. It modified a portion of the sentence imposed by the 4th District Court as being without authority and void, (Appendix B).

On April 11, 1991 the Appellant requested

leave to appeal to the New York State Court of Appeals arguing that, (1) the ruling below still remains in error of, local law, general State law, and violates fundamental Constitutional rights, Appendix J(10-11).

On June 10, 1991 the Court of Appeals, in its opinion, found there is no question of law presented which ought to be reviewed by the New York Court of Appeals, Appendix A.

REASON FOR GRANTING THE WRIT

This case raises questions similar to those resolved by this Court in Marbury v. Madison where Marbury, an officer duly appointed by legislated law, was to be removed from office at the will of the Chief Executive, this Court found such an act, simply at the discretion of the Executive Branch of government, not warranted by the

law as enacted by duly elected Legislative Representatives, to be void. In the instant case, we have "an act deemed by the Court not warranted by law", (Marbury v. Madison, supra, at 162.

One fundamental principle of our society, which this Union of States and its Government have always strived to achieve, as enunciated by this Court in Marbury, is to assure that we as a society be "a government of laws, and not of men", Marbury v. Madison, supra, at 163.

Natural law, and Legislated law, never declared unconstitutional by the New York State Court's, cannot be implicitly deemed unconstitutional, by denying it effect, nor can general State and Local legislated laws on fences be dangerously modified by a Court to remove the safety and welfare requirements provided by elected Legislators.

This Courts opinion was clearly enunciated by Chief Justice Marshall in Marbury v. Madison, supra, and its pertinent to quote the following relevant passage:

> "Certainly, all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution,is void.
>
> This theory is essentially attached to a written constitution, and is, consequently, to be considered, by this court, as one of the fundamental principles of our society. It is not, therefore, to be lost sight of, in the further consideration of this subject." Id, at 177.

It is constitutionally established we are

> "a government with limited ... powers", Id, at 176-177.

And, by this Courts theory, as enunciated by Chief Justice Marshall, neither the Executive Branch, Legislature or a Court can

be allowed to overthrow what is Constitutionally valid law. And, duly established law by elected New York State Legislators that explicitly defines the purpose and function of a fence in general law of State-wide application, can't be selectively overthrown in this Appellant's case, and certainly Court's cannot overthrow self-evident Natural law established by the Creator.

Certainly all those who have legally defined a fence must have contemplated that it should form a basis for all fence law, and therefore the legal definition of a fence, as defined and used in the general law of the State of New York, and universally defined, the same way, throughout this Nation, Appendix J(5), should by this Court's theory be attached to the Town of Oyster Bay Fence

Ordinance Sec. 327. This Appellant's rose vines are shaped upon trellis arbors that vary slightly in concept and design in different area's of my yard. Certainly this difference does not create the basis for coloring them a fence, when the trellis arbors are separate and distinct, do not shut in the land, support ivy, rose and grape vines, and are located on private property, behind a legal six-foot stockade fence, that bars public entry, Const Amends 1, 5, 9, 14.

> This Court has frequently ruled that; "equitable jurisdiction exists to restrain criminal prosecutions under unconstitutional enactments, when the prevention of such prosecutions is essential to the safeguarding of rights of property". Packard v. Banton, 264 U.S. 140, 143, 44 S.Ct. 257, 68 L.Ed. 596 (1924), and cases there cited.

The preamble to the Universal Declaration of Human Rights affirms that vested rights "be protected by the rule of law", 183rd

meeting of the U.N. General Assembly (1948), and as eloquently stated by Chief Justice Marshall in Marbury;

> "The very essence of Civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection" (Marbury v. Madison, supra, at 163, emphasis added).

The fundamental principle of protection under the rule of law as advanced by Chief Justice Marshall in Marbury is also recognized in the dissenting opinion of Justice Holmes in Tyson when he said;

> "A state legislature can do whatever it sees fit to do...and courts should be careful not to (read into them) conceptions of public policy that a particular court may happen to entertain." Tyson & Brother, etc. v. Banton, 273 U.S. 418, 445, 446, 47 S.Ct. 426, 433, 434, 71 L.Ed. 718 (1927).

If State Court's believe safety and welfare policies, or statutes, of elected

representatives are perhaps unwise, this does not provide a Constitutional basis for setting them aside. In the absence of any Constitutional restriction, a State is free to adopt its own laws, or legal definition of a fence,

> "...courts do not substitute their ... beliefs for the judgment of Legislative bodies, who are elected to pass laws." Ferguson v. Skrupa, 372 U.S. 726, 730, 83 S.Ct. 1028, 1031, 10 L.Ed.2d 93 (1963).

This Court certainly must recognize that its powers were limited by the Founders, who knew that **unlimited power** could not be placed in the hands of a few men, so too State Court power is not unlimited, and

> "that those limits may not be mistaken or forgotten, the Constitution (was) written." (Marbury v. Madison, supra, at 176, emphasis added).

Our Constitution does not speak in so many words of a right to be protected by

legislated law, as it is clearly defined, or the right to be equally protected under self-evident Natural law, or the right of duly elected Legislative bodies to enact their own constitutional laws, but the Ninth Amendment expressly recognizes fundamental personal and State rights such as these, to prevent any perverse application, as in the instant case, where "pieces of trellis work" were deemed a fence, when the Respondent's attorney alleged them to be a fence, "for lack of a better word", Trial Transcript, pg 67, lns 1-7 Appendix K(9), and pg 42, lns 9-10, Appendix K(7).

The meaning of Social rights and Property rights as defined by our Constitution should not be so diluted as to be loathsome to the premises established by the Framers, by

selectively suppressing this Rosarian's thoughts, ideas, and feelings for Nature, or suppressing the rule of law, etc., which are imbedded in the due process of law and

> "which lie at the base of all our civil and political institutions", Herbert v. State of Louisiana, 272 U.S. 312, 316, 47 S.Ct 103, 104, 71 L.Ed 270 67 (1934).

As no Court can legally suppress the protections of fundamental State or personal rights, then certainly Court discretion cannot be used as leverage to abridge those fundamental rights, especially when there is a compelling reason for the New York State Legislature to have clearly defined a fence as

> "enclosed in a manner designed to exclude intruders", N.Y.State Penal Law, Title I, Sec. 140.10(a), Appendix I(3).

When a State legislature exercises its

power to protect the lives and health of its people, by clearly and legally defining a fence, in its general law, a State Court should not abridge State-wide Legislative intent, by effectively removing the safety and welfare restrictions placed on fences in both general State and local law, by the elected Legislators. (Const. Amend. 14).

Not so many years ago this Court stated the Due Process Clause of the Fourteenth Amendment protects those vested liberties

> "so rooted in traditions and conscience of our people as to be ranked as fundamental "Snyder v. Com. of Massachusetts, 291 U.S. 97, 105, 54 S.Ct. 330, 332, 78 L.Ed. 674 (1934).

All fundamental personal rights were protected from abridgment by the Framers, therefore, if we hold to the principle that we are a government of law and not of men, as rooted in the traditions and collective

conscience of our people, then the fundamental constitutional right to be protected in accordance with clearly defined general State law, or the self-evident law's of Nature, cannot be denied, by either the Legislative, Executive or Judicial Branch of Federal or State Governments, to dootherwise

> "would subvert the very foundation of (our) written Constitutions (State and Federal)." (Marbury v. Madison, supra, at 178.

This Court has held in Marbury that the denial or disparaging of the fundamental principles and rights the Framers provided for, in our written Constitution would certainly be "repugnant to the Constitution", and hence "void". Therefore "the very essence of judicial duty" demands that the rule of law guide New York State Court's in the exercise of their jurisdiction, and that they

not be in conflict with the Constitution, Marbury v. Madison, supra, at 177-8).

It is not substantive due process to selectively burden the incidental accessory use of this Appellant's private property, under color of fence law as this does not afford the protection inherent in a Constitutional government, where law is defined in the best interest of the people, and where men are ruled by the defined law, or assure the Framers intention that the legislated law, **as duly established opinion** shall be paramount to the discretion or opinion of a few men, and bring in its application **an equality of justice less tainted with individual prejudice**, Const. Amend. 14.

The entire fabric of our Nation, and its experiment with Constitutional law,

guaranteeing personal fundamental rights, should not be so diluted by the ruling in the instant case, as to allow bald assertion, rather than Constitutional law, to be the guide to a Court's jurisdiction. The Constitution and the purposes that clearly underlie its specific guarantees demonstrate that the right to be protected or treated equally under explicitly defined fence law, and the right to be protected under our law to equal treatment under self-evident Natural law, is of a similar order and magnitude as other fundamental rights protected by the Constitution (Const. Amends. 1, 5, 9, 14).

CONCLUSION

The subject matter of the instant case, trellis arbors and fences, may have seemed trivial to the New York State Court of Appeals, and the other State Courts I've

argued this case before, but we certainly do not live in a world where Court opinion can physically change apples into oranges or trellis arbors into a fence. State Courts should not lose sight of the magnitude of the tyranny involved in debasing Constitutional law, Natural law, or vested State, Federal and Personal rights. To lose sight of the consequences of establishing the opinion of men over the rule of law, as clearly and legally defined in established State law, is repugnant to Constitutional principles.

The Framers molded and defined our Constitution, in the fire of their cumulative experience, tempered it by their will, and fashioned a document that would outlaw the torture and pain denial of liberty imposes on man, and provided us a foundation for the legal pursuit of happiness under the rule of

Constitutional law. The Framers knew the consequences of social misery and man's inhumanity to man, and provided us the legal framework, for the furtherance of ethics, morality and personal rights as the Creator meant it should be. The Framers sought, by the Bill of Rights and the Constitution, to reaffirm and protect liberty, by explicitly defining some of our Fundamental rights, so their children and ours would be free to think, to express themselves, to revere Nature as the creation of a superior intelligence, in their own way. To debase the Constitution and overturn self-evident law, which is the expression of Gods will, violates the imperative the Framers understood, that God did not create man to become slaves of men, or slaves of oppressive government, but created man to be free, to

care for our world, and rever it, each in his own humble way, which in sum, attains God's mightiest aspiration, a world where men practice what is morally right. The Framers did not create our government to interfere in their affairs to the extent of denying their freedom in the private gardens of their established homes.

Is this Rosarian's freedom to design differing trellis arbors any different from the freedom to design a little different car or a little different home, etc.? Is the lexicographic skill of the Respondent, to vaguely define a trellis arbor to the Court as a fence "for lack of a better word", a valid Constitutional basis for a Court giving no effect to fundamental State and personal rights, general law or compelling public safety and welfare concerns? The Framers

always rested upon a far broader base of historical and self evident Natural law as the basis for their jurisdiction, and "no law", provision, ruling or opinion was ever sanctioned by this Court as being able to abridge "deny or disparage" the vested freedoms enumerated or implied to the people, or the States, by the Constitution. Vested freedoms cannot be denied, just because an idea, person or object is a little different. This Nations progress was founded upon freedom of thought, ideas, and their expression and it is the Constitution that provides a foundation for Liberty and progress by accommodating diversity among individuals and States, Const. Amend. 1, 9.

The instant case warrants this Courts attention because under our Constitution fundamental rights are protected from

abridgment by either the Federal Government, or the States, and their respective Courts, Const. Amend 5, 14; and see Bolling v. Sharp, 347 US 497, 74 S.Ct. 693 (1954) among others.

Any violation of the First, Fifth, Eighth, Ninth and Fourteenth Amendments, by State Court's giving them no effect, or giving no effect to the defined meaning of the words, phrases and objects of this world, or no effect to self-evident Natural law, injures not only this Appellant, but injures the inherent dignity and meaning of our vested inalienable rights, carefully defined by the Framers when they sought to explicitly define some of our fundamental rights.

Certainly the Framers intended that the Courts should not substitute their day to day beliefs, for the judgement of duly constituted Legislative bodies elected to

pass laws. The means used by the 4th District Court, to deem trellis arbors a fence, and remove the stringent public safety and welfare requirements for a fence, and selectively increase requirements for light and air on this Appellants private property, does not justify the end, of (1) fundamental 1st, 5th, 8th, 9th and 14th Amendment principles, and personal rights, (2) vested States rights, (3) the safety and welfare of the general public, (4) established traditions of enacting law by duly elected representatives, and (5) the Constitutional imperative of the Framers to separate governmental functions, so unlimited power, would be divided.

This Court, as legal Guardian of the Constitution, cannot close its eyes to a perverted debasing of the fundamental moral

and legal principles men have always sought to protect from the tyranny, or the discretion, of a few men. The Framers created a Nation where defined law is rooted in the traditions of our people, and it does not allow for Constitutionally invalid convictions that overthrow vested rights, as this is not morally or legally right. This Appellant is not guilty of the offense for which convicted.

For the reasons set forth above, a writ of certiorari should issue to review the judgment, sentence and opinions of the New York State Courts in this matter.

In the event this Court elects not to address the fundamental Federal questions presented in this writ, at the present time, it should not preclude the further

consideration of this Appellants important and valuable personal rights, and vested States rights threatened in the instant case. Therefore the writ should issue, and the matter remanded back to the State Courts for redetermination, for it is essential that Human Rights be protected by the rule of law, as a normal standard of justice, and that men not continually be compelled to defend themselves against tyranny and oppression. State Court's must give effect to vested Fundamental rights, Constitutional law, general State law and Local ordinances, in the course of their Judicial proceedings, and cannot so flippantly disregard the legal nexus which binds this Appellant, and each State, to the rest of the Nation, the Constitution of the United States of America.

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DATED: October 1, 1991.

Respectfully submitted,

Paul J. Cafaro

PAUL J. CAFARO
Appellant, pro se